APPENDIX A

[Dated July 21, 1999]

No. 3-98-0472

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 1999

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellant,

v.

NASHAUN B. QUICK,

Defendant-Appellee.

Appeal from the Circuit Court of the 14th
Judicial Circuit Rock Island County, Illinois, No. 97-CF-556
Honorable J. Donald O'Shea, Judge Presiding.

ORDER

NOT TO BE PUBLISHED

The defendant, Nashaun Quick, was convicted by a jury of first degree murder (720 ILCS 5/9-1(a)(3) (West 1996)) and was sentenced to natural life in prison without the possibility of parole. On appeal, he contends that: (1) the trial court erred in allowing the statements of his co-defendants to be used at trial; (2) the trial court erred in failing to grant him a new trial as a sanction against the State for its failure to comply with discovery rules; (3)

the trial court erred in failing to grant him a new trial because a key witness altered her testimony in the co-defendant's trial; (4) the State failed to prove the defendant's guilt beyond a reasonable doubt; and (5) the trial court abused its discretion in sentencing the defendant to natural life in prison. For the reasons that follow, we affirm the defendant's conviction but modify his sentence.

FACTS

Derrick Rhoden, Jeremiah Jamison, and the nineteen-year-old defendant were accused of participating in the June 11, 1997, murder of Paul Foster. Rhoden and Jamison were given immunity in exchange for their testimony in the defendant's case.

Jamison told police that he, along with Rhoden and the defendant, had been involved in a fight with members of the Gangster Disciples on the day of the murder, and that the three of them returned to the victim's home later that night to scare members of the gang. Once there, they decided to shoot at the victim's house. Jamison told police that the defendant was the shooter.

Rhoden gave a similar statement to the police. He specified that the defendant began shooting at the victim's house while standing on a sidewalk at the west side of the house. According to Rhoden, the defendant shot a nine millimeter black gun five or six times into the front of the house as he walked east.

Rhoden's account was corroborated by the evidence. Numerous bullet holes were found in the front (south side) of the house and 11 spent nine millimeter shell

casings were discovered in that location. In addition, a nine millimeter slug was recovered from the victim's body which was found in a bedroom in the southwest corner of the house.

The victim's girlfriend, Mae MacQuieter, testified that she was sleeping on a couch in the victim's home at about 1:30 a.m. on June 11, 1997, when she was awakened by several gunshots. When the shots stopped, she went into the bedroom and found the victim on the floor with blood on his chest. The victim died as a result of the shooting.

Jamison, despite his grant of immunity, denied at trial the information he had related to the police and testified that he had not participated in the crime. Rhoden refused to answer any questions at trial. Over the defendant's objections, Jamison's pre-trial statement and the referenced portion of Rhoden's were admitted into evidence.

Officer Harder of the Rock Island police department testified that he responded to a report of a fight near the victim's residence on the afternoon of the day preceding the shooting. He observed the defendant with a bloodied lip and "in a fit of rage."

The defendant theorized at trial that a Charles Davis and members of Davis' gang committed the murder due to a dispute with the victim over the selling of drugs from the victim's house. This theory was based, at least in part, upon a discussion his counsel had prior to trial with Officer Poulos of the Rock Island police department. A memo (the Poulos memo), prepared by Poulos prior to this meeting, was not provided to counsel until the third day of trial.

At their meeting, Poulos informed counsel that the victim had met with him the day of the murder. The victim told Poulos that he feared for his life because he was being threatened by Charles Davis. The actual Poulos memo revealed also that a confidential informant had reported to Officer Poulos that a woman named Mary Fender had told him that Charles Davis and Terrance Brannigan committed the murder.

Upon receiving the Poulos memo, the defendant claimed surprise and moved for a mistrial. The court denied the motion, but granted the defendant a two-week continuance. As an additional sanction, the court allowed the memo to be introduced by the defense as evidence.

When the trial resumed, the defendant called a number of witnesses, including three alibi witnesses. In addition, a neighbor of the victim testified that the victim was concerned about activity near his home, and a police officer testified that there was a lot of drug dealing in the area surrounding the victim's home.

The defendant also called Charles Davis to the stand. Davis denied being involved in the murder of the victim, but admitted that he was involved in a fight near the victim's residence on the afternoon of the murder. Mary Fender also testified, and denied ever saying that Davis and Brannigan committed the murder.

At the close of the case, the jury found the defendant guilty of first degree murder. About two weeks after trial, defense counsel was advised by the State that there were other interviews, documents, and memos that were inadvertently not disclosed. After the documents in question were revealed to the defendant, he filed motions for judg-

ment notwithstanding the verdict and for a new trial. The court denied the motions.

The defendant was sentenced to natural life in prison and this appeal followed.

ANALYSIS

I. Admissibility of Co-Defendant's Statements

The defendant argues that the court erred when it allowed Rhoden's statement to be used a trial. The defendant contends that Rhoden's statement was unreliable, and should have been inadmissible.[1] We disagree.

Section 115-10.2 of the Code of Criminal Procedure (Code) (725 ILCS 5/115-10.2 (West 1996)) provides for the admissibility of a statement when a witness refuses to testify despite a court order to do so. In such instance, the rule provides that a prior statement of the witness bearing sufficient guarantees of trustworthiness can be admitted into evidence if the court determines that the statement is offered as evidence of a material fact, it is more probative of that fact than any other evidence which the proponent can procure through reasonable efforts, and the interests of justice are best served by the

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[1] In setting forth his general issue on appeal, the defendant challenges both Jamison's and Rhoden's statements. However, in his written and oral arguments the defendant addressed only the admissibility of Rhoden's statement. Therefore, we will not consider the admissibility of Jamison's statement. See *People v. McCarthy*, 213 Ill.App.3d 873, 885, 572 N.E.2d 1219, 1226 (1991) (mere contentions without argument or citation to authority do not merit consideration on appeal).

admission of the evidence. 725 ILCS 5/115-10.2 (West 1996).

In the instant action, Rhoden was given immunity and the court ordered him to testify. He refused to do so, and was therefore "unavailable" within the meaning of Section 5/115-10.2(c) of the Code. 725 ILCS 5/115-10.2(c) (West 1996)

Rhoden's prior statement to the police was admitted to show the type of gun that was used to commit the murder, as well as the location from where the shots were fired. The statement bore sufficient indicia of reliability because Rhoden incriminated himself in the statement, and the statement was consistent with Jamison's statement and the physical evidence.

Rhoden's statement was material evidence in the case because it placed the gun in the defendant's hand, described the method of the murder, and explained the type of gun that was used. His statement was the most detailed eyewitness report of the circumstances that gave rise to the victim's death. Therefore, the interests of justice were served by allowing this probative evidence to be used at trial. Accordingly, we find that the trial judge did not err in allowing Rhoden's statement to be admitted into evidence.

II. Discovery Violations

The defendant next argues that the court should have granted him a new trial because the State failed to disclose a number of documents that were material to his case. In addition to the Poulos memo served upon the

defendant the third day of trial, the State disclosed a number of other documents relating to the case after the jury returned its guilty verdict.

One such document was labeled "Rock Island Police Department Interoffice Correspondence" and dated June 13, 1997. This report indicated that a neighbor of the victim told the police that there was drug activity in the neighborhood. The neighbor also corroborated that a fight occurred on the day of the murder between two rival gangs.

Other interoffice correspondence, also dated June 13, 1997, reported a tip from a concerned citizen who had been told that a "cousin to the Lee's shot Paul Foster." Two other documents disclosed that Danny Babers saw a group of people in the victim's home at about 11:45 p.m. on the evening of the murder. One of these people carried a .22 caliber gun, and another went by the name of "Cool," the nickname of Charles Davis.

An undisclosed crime stoppers' report dated June 12, 1997, stated that an anonymous caller reported that a co-worker told him that a person named "Dinky," who sold drugs in front of the victim's residence, murdered a male in Rock Island that week. The report states that either Darren Chandler or Edward Rhoden used the alias of "Dinky." A crime tip informant sheet mentioned "Dinky" and "Terrance" as people who may have been involved in the murder.

The State does not argue that the reports were exempt from discovery. Rather, it contends that the defendant has failed to show that the documents were material. The defendant does not accuse the State of acting in bad

faith, but contends that the undisclosed evidence was material and that he was prejudiced by the State's failure to make timely disclosures. He argues that he would have changed his trial strategy, at least in part, had these documents been disclosed before trial. For instance, in addition to Davis and Brannigan, he may have tried to also point the blame toward "Dinky", Edward Rhoden, or a cousin of Lee who are all mentioned as the possible murderer in at least one of the undisclosed reports.

The standard of review for a discovery sanction is whether the trial court abused its discretion. *People v. Matthews*, 299 Ill.App.3d 914, 918, 702 N.E.2d 291, 294 (1998). The government has an affirmative duty to disclose evidence favorable to a defendant. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194 (1963). The suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. *Brady*, 373 U.S. at 87, 83 S.Ct. at 1196-1197.

To establish a violation, suppressed evidence must be both favorable to the accused and material. *People v. Hobley*, 182 Ill.2d 404, 432-433, 696 N.E.2d 313, 328 (1998). Favorable evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome of the proceeding would have been different. *Hobley*, 182 Ill.2d at 432-433, 696 N.E.2d at 328. A reasonable probability of a different result is a probability sufficient to undermine confidence in the outcome of a case. *Hobley*, 182 Ill.2d at 433, 696 N.E.2d at 328.

Initially, we note that the court imposed reasonable sanctions for the State's tardy disclosure of the Poulos memo. Permitting the defendant to introduce the memo into evidence allowed the defendant to bolster its theory of the case in a way it could not have done without the violation. The court also properly granted the defendant a continuance.

With respect to the post-trial disclosures by the State, the trial judge analyzed the materiality of each of the documents in a series of detailed written opinions. The court found most troubling, as do we, the undisclosed reports pertaining to Danny Babers' claims that while purchasing cocaine from the victim at 11:45 p.m., he observed four other black males, including one by the name of "Cool" and one with a gun at the victim's home. Clearly, the failure to disclose this evidence constituted a serious discovery violation, and deprived the defendant of the opportunity to call Babers as a witness to bolster his theory that Charles Davis and his associates were the responsible parties. Even so, we cannot find any reasonable probability that the outcome of the proceeding would have been different had the defendant received the benefit of Babers' testimony. In the first place, there is a serious questions as to the credibility of Babers. In his statement to Detective Sullivan, Babers admitted that he wasn't sure whether he was at the victim's house the night of the murder or the previous night and admitted to being under the combined influence of alcohol and cocaine at the time. Moreover, even allowing that Charles Davis may have been in the victim's house at 11:45 p.m. in the company of a companion armed with a .22 caliber gun, it does not logically follow that he was

responsible for a shooting that occurred at 1:30 a.m. from outside the house with a nine millimeter gun.

Due to the substantial evidence of the defendant's guilt and a lack of showing of materiality of the undisclosed evidence, we do not believe that the outcome of the proceeding would have been different if the undisclosed evidence had been presented to the jury. Accordingly, we find that the trial court did not abuse its discretion in denying the defendant's request for a new trial based on the State's discovery violations.

III. Altered Testimony of State's Witness

The defendant contends that the victim's girlfriend, Mae MacQuieter, substantially changed her testimony when called by the State to testify at co-defendant Rhoden's subsequent trial. Therefore, the defendant argues that the trial court should have granted his motion for a new trial on that basis.

To warrant a new trial based on newly discovered evidence, the evidence: (1) must be of such conclusive character that it would likely change the result on retrial; (2) must be material to the issue but not merely cumulative; and (3) must have been discovered since the trial and be of such character that it could have not been discovered sooner through the exercise of due diligence. *People v. Smith*, 177 Ill.2d 53, 82, 685 N.E.2d 880, 892 (1997). Here, the defendant has failed to show, *inter alia*, his exercise of due diligence.

At the defendant's trial, MacQuieter testified that only she and the victim were in the house at the time of the

shooting. She also testified that when she and the victim arrived at the house around 9:30 p.m., it did not appear that anyone else had been there. A careful review of the record in this case reveals that MacQuieter never said, nor was she asked on either direct or cross-examination, whether prior to the shooting there were any visitors after she and the defendant arrived home at 9:30 p.m.

According to the defendant, he has "learned from various sources" that during Rhoden's trial, MacQuieter testified that approximately 20 minutes before the shooting, an individual came to the victim's house on the night in question, and that she heard the victim and this other individual speaking in a loud voice. Aside from the fact that the defendant has failed to include in the record on appeal the relevant portion of the transcript from Rhoden's trial, we find his contention to be without merit. See Supreme Court Rule 323(a) (134 Ill.2d R. 323 (a)) (the report of proceedings shall include all the evidence pertinent to the issues on appeal).

The report of MacQuieter's pre-trial statement, which was disclosed to the defendant prior to trial, included her statement that: "[T]hey know I was in the house!" Such a declaration by MacQuieter should have alerted defense counsel to the possibility of some interaction between the victim and assailants prior to the shooting. Therefore, his contention that he did not have any reason to ask about such a possibility during his cross-examination of MacQuieter is not compelling. He also makes no claim that he attempted to interview MacQuieter before trial to ascertain the circumstances surrounding the shooting. Accordingly, we conclude that defendant failed to exercise due diligence in discovering the matter about which

he now complains, and the trial court did not abuse its discretion in denying his motion for new trial on this ground.

IV. Sufficiency of the Evidence

The defendant next contends that the State failed to prove him guilty of first degree murder beyond a reasonable doubt. The standard of review for such contention is whether, after viewing the evidence in the light most favorable to the State, any rationale trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill.2d 237, 261, 478 N.E.2d 267, 277 (1988).

The defendant argues that the verdict is not supported by the evidence because the State presented no unbiased third party witness, the defendant did not confess, and there was no physical evidence linking the defendant to the crime. Our review of the evidence, however, in the light most favorable to the State, leads us to conclude that it was sufficient to prove the defendant's guilt beyond a reasonable doubt. The statements of Jamison and Rhoden implicating the defendant were consistent with each other and with the physical evidence in the case, including Rhoden's accurate description of the type of weapon used in the commission of the crime and the defendant's location when he fired the shots into the house. Furthermore, Officer Harder confirmed that the defendant was involved in a fight outside the victim's residence the afternoon before the shooting. This evidence was sufficient to support the defendant's conviction.

V. Imposition of Sentence

The defendant argues that the trial judge erred in imposing a sentence of natural life. He contends that the trial court imposed the sentence under section 9-1(b)(6) of the Criminal Code of 1961 (Criminal Code) (720 ILCS 5/9-1(b)(6) (West 1996)). That section, when read in conjunction with section 5-8-1(a)(1)(b) of the Unified Code of Corrections (Corrections Code) (730 ILCS 5/5-8-1(a)(1)(b) (West 1996)) authorizes a natural life sentence for first degree murder when the victim was killed by the defendant in the course of another felony. Since the "other felony" in this instance, aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(1) (West 1996)), is not one of the felonies enumerated in section 9-1(b)(6), the defendant maintains that the court erred in imposing the natural life sentence. In response, the State argues that the sentence was not imposed pursuant to these provisions, but rather pursuant to the alternative provisions of section 5-8-1(a)(1)(b) of the Corrections Code, which authorizes the imposition of a natural life sentence when the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

Sentencing is a matter of judicial discretion and absent an abuse of that discretion by the trial court, a sentence may not be altered on review. *People v. Solano*, 221 Ill. App.3d 272, 273, 581 N.E.2d 889, 890-91 (1991).

At the sentencing hearing, the assistant state's attorney, after reviewing the defendant's criminal history and other statutory factors in aggravation, recommended a prison sentence in the range of 45 to 55 years. Defense

counsel, noting the defendant's youth and rehabilitative potential, proposed a sentence of 25 to 30 years.

The trial judge noted that the standard range for first degree murder is 20 to 60 years, and that the extended term range is 60 to 100 years. See 730 ILCS 5/5-8-1 (a)(1)(a), 5/5-8-2(a)(1) (West 1996). After finding that the defendant was not eligible for an extended term, he sentenced the defendant to a term of natural life. In so doing, we hold the court abused its discretion.

A defendant convicted of first degree murder may be sentenced to natural life imprisonment:

> "if the court finds that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty or, * * * that any of the aggravating factors listed in subsection (b) of Section 9-1 of the Criminal Code of 1961 are present * * *. 730 ILCS 5/5-8-1(a)(1)(b) (West 1996).

Since the crime of aggravated discharge of a firearm, which is the predicate felony of the defendant's felony murder conviction, is not one of the felonies enumerated in section 9-1(b)(6)(c) of the Criminal Code, he could be sentenced to natural life in this case only if the court found that the murder was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty. Here, the court made no such express finding. Moreover, the court specifically found that the defendant was not eligible for an extended term sentence.

Section 5-5-3.2(b)(2) of the Corrections Code provides that a court may impose an extended term sentence, *inter alia*:

> "when a defendant is convicted of any felony and the court finds that the offense was accompanied by exceptionally brutal or heinous behavior indicative of wanton cruelty[.]" 730 ILCS 5/5-5-3.2(b)(2) (West 1996).

Accordingly, the defendant could not possibly be *ineligible* for an extended term sentence, and the same time be *eligible* for a natural life sentence for his particular crime. Therefore, the maximum sentence allowable was 60 years. Because we defer to the trial court's other findings, including the defendant's criminal history, the crime's relationship to organized gang activities, and the need to deter others from committing such a horrific crime, we modify the defendant's natural life sentence to the maximum allowable term of imprisonment, 60 years, pursuant to Supreme Court Rule 615(b)(4) (134 Ill.2d R. 615(b)(4)).

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is affirmed as modified.

Affirmed as modified.

HOMER, J., with HOLDRIDGE, P.J., and SLATER, J., concurring.

APPENDIX B

[Dated December 7, 1999]

No. 3-98-0472

IN THE
APPELLATE COURT OF THE STATE OF ILLINOIS
THIRD JUDICIAL DISTRICT

A.D., 1999

PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

v.

NASHAUN B. QUICK,

Defendant-Appellant.

Appeal from the Circuit Court of the 14th
Judicial Circuit Rock Island County, Illinois, No. 97-CF-556
Honorable J. Donald O'Shea, Judge Presiding.

Justice Homer delivered the opinion of this court:

Publ. In Full

The defendant, Nashaun Quick, was convicted by a jury of first degree murder (720 ILCS 5/9-1(a)(3) (West 1996)) and was sentenced to natural life in prison without the possibility of parole. On appeal, he contends that: (1) the trial court erred in allowing the statements of his alleged accomplices to be used at trial; (2) the State failed to prove the defendant's guilt beyond a reasonable doubt; (3) the trial court erred in failing to grant him a new trial

because a key witness altered her testimony in the trial of an accomplice; (4) the trial court erred in failing to grant him a new trial as a sanction against the State for its failure to comply with discovery rules; and (5) the trial court abused its discretion in sentencing the defendant to natural life in prison. For the reasons that follow, we reverse the defendant's conviction and remand this cause for a new trial.

FACTS

Derrick Rhoden, Jeremiah Jamison, and the 19-year-old defendant were accused of participating in the June 11, 1997, murder of Paul Foster. Rhoden and Jamison were given immunity in exchange for their testimony in the defendant's case.

Jamison told police in a tape-recorded statement that he, along with Rhoden and the defendant, had been involved in a fight with members of the Gangster Disciples on the day of the murder, and that the three of them returned to the victim's home later that night to scare members of the gang. Once there, they decided to shoot at the victim's house. Jamison told police that the defendant was the shooter.

Rhoden gave a similar taped statement to the police. He specified that the defendant began shooting at the victim's house while standing on a sidewalk near the front of the house. According to Rhoden, the defendant shot a 9-millimeter black gun five or six times into the front of the house as he walked east.

In fact, numerous bullet holes were found in the front (south side) of the house and 11 spent 9-millimeter shell

casings were discovered in that location. In addition, a 9-millimeter slug was recovered from the victim's body which was found in a bedroom in the southwest corner of the house.

The victim's girlfriend, Mae MacQuieter, testified that she was sleeping on a couch in the victim's home at about 1:30 a.m. on June 11, 1997, when she was awakened by several gunshots. When the shots stopped, she went into the bedroom and found the victim on the floor with blood on his chest. The victim died as a result of the shooting.

After receiving grants of immunity, Jamison and Rhoden were called to testify for the State. At trial, Jamison recanted the statement he had given to the police and testified that he had not participated in the crime. Rhoden refused to answer any questions at trial. Over the defendant's objections, Jamison's taped statement and the referenced portion of Rhoden's were admitted into evidence.

Officer Harder of the Rock Island police department testified that he responded to a report of a fight near the victim's residence on the afternoon of the day preceding the shooting. He observed the defendant with a bloodied lip and "in a fit of rage."

The defendant theorized at trial that a Charles Davis and members of Davis' gang committed the murder due to a dispute with the victim over the selling of drugs from the victim's house. This theory was based, at least in part, upon a discussion his counsel had prior to trial with Officer Poulos of the Rock Island police department. A memo (the Poulos memo), prepared by Poulos prior to this meeting, was not provided to counsel until the third day of trial.

At their meeting, Poulos informed counsel that the victim had met with him the day of the murder. The victim told Poulos that he feared for his life because he was being threatened by Charles Davis. The actual Poulos memo revealed also that a confidential informant had reported to Officer Poulos that a woman named Mary Fender had told him that Charles Davis and Terrance Brannigan committed the murder.

Upon receiving the Poulos memo, the defendant claimed surprise and moved for a mistrial. The court denied the motion, but granted the defendant a two-week continuance. As an additional sanction, the court allowed the memo to be introduced by the defense as evidence.

When the trial resumed, the defendant called a number of witnesses, including three alibi witnesses. In addition, a neighbor of the victim testified that the victim was concerned about activity near his home, and a police officer testified that there was a lot of drug dealing in the area surrounding the victim's home.

The defendant also called Charles Davis to the stand. Davis denied being involved in the murder of the victim, but admitted that he was involved in a fight near the victim's residence on the afternoon of the murder. Mary Fender also testified and denied ever saying that Davis and Brannigan committed the murder.

At the close of the case, the jury found the defendant guilty of first degree murder. About two weeks after trial, defense counsel was advised by the State that there were other interviews, documents, and memos that were inadvertently not disclosed. After the documents in question were revealed to the defendant, he filed motions for

judgment notwithstanding the verdict and for a new trial. The court denied the motions.

The defendant was sentenced to natural life in prison and this appeal followed.

ANALYSIS

I. Admissibility of Accomplices' Statements

We first consider the defendant's contention that the trial court erred in allowing the State to introduce portions of Rhoden's taped statement.[1] The defendant argues that he was denied a fair trial because (1) the statement lacked sufficient indicia of reliability to qualify for admission under section 115-10.2 of the Code of Criminal Procedure of 1963 (Code) (725 ILCS 5/115-10.2 (West 1998)), and (2) the admission of the statement violated his constitutional right to confront witnesses against him (U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8). These are interrelated issues.

In 1996, the Illinois General Assembly addressed the issue of the admissibility of extrajudicial statements of reluctant witnesses in criminal cases. The resulting leg-

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[1] In setting forth his general issue on appeal, the defendant challenges both Jamison's and Rhoden's statements. However, in his written and oral arguments the defendant addressed only the admissibility of Rhoden's statement. Therefore, we will not consider the admissibility of Jamison's statement. See *People v. McCarthy*, 213 Ill.App.3d 873, 885, 572 N.E.2d 1219, 1226 (1991) (mere contentions without argument or citation to authority do not merit consideration on appeal).

islation, contained in section 115-10.2 of the Code, provides in relevant part as follows:

> "(a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule if the declarant is unavailable as defined in subsection (c) and if the court determines that:
>
> (1) the statement is offered as evidence of a material fact; and
>
> (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts[.] * * *
>
> * * *
>
> (c) Unavailability as a witness is limited to the situation in which the declarant persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so." 725 ILCS 5/115-10.2 (West 1998).

The provisions of section 115-10.2 were included in the first conference committee report to House Bill 1249. During floor debate, Representative Durkin explained:

> "[T]hrough this Amendment, we have adopted the federal rule of evidence, particularly, 804(b)5 [Fed.R.Evid. 804(b)(5) (transferred to Fed.R.Evid. 807).], which is commonly known as the residual hearsay exception. The federal rule has been in place for approximately 20 years, which specifically it [*sic*] states that certain statements by witnesses will be admitted as substantive evidence in a state's case in chief, despite the fact

> that there has been no confrontation if there are individual guarantees of trustworthiness." 89th Ill. Gen. Assem., House Proceedings, May 24, 1996, at 5 (statements of Representative Durkin).

In the instant action, Rhoden was "unavailable" within the meaning of section 115-10.2(c) of the Code (725 ILCS 5/115-10.2(c) (West 1996)), because after he was granted immunity in exchange for his testimony, he refused to testify. Further, Rhoden's statement was offered as evidence of material facts in that it described the shooting, placed the gun in the defendant's hand, and specified the type of gun that was used to commit the murder. See 725 ILCS 5/115-10.2(a)(1) (West 1996). His statement was also the most probative evidence of the defendant's guilt because it was the most detailed eyewitness report of the circumstances that gave rise to the victim's death. See 725 ILCS 5/115-10.2(a)(2) (West 1996).

However, in order for Rhoden's hearsay statement to be admissible, it must also be found to possess sufficient "circumstantial guarantees of trustworthiness." 725 ILCS 5/115-10.2 (West 1998). Our analysis in this regard must begin and end with an examination of the defendant's rights under the confrontation clause.

The confrontation clause guarantees a defendant the right to confront his accusers and ensures the reliability of evidence against a defendant by subjecting it to rigorous testing in an adversary proceeding. *Maryland v. Craig*, 497 U.S. 836, 845, 111 L. Ed. 2d 666, 678, 110 S.Ct. 3157, 3163 (1990). The confrontation clause prohibits the admission of the declarant's hearsay statement inculpating the defendant unless it can be shown that (1) the declarant is unavailable, and (2) his statement bears

adequate "indicia of reliability." *Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608, 100 S.Ct. 2531, 2539 (1980). Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. *Roberts*, 448 U.S. at 66, 65 L.Ed.2d at 608, 100 S.Ct. at 2539.

We first consider whether Rhoden's statement was admitted pursuant to a "firmly rooted hearsay exception." While the hearsay exception for statements against pecuniary interest is rooted in the English common law, the practice by which the government seeks to introduce the confession of an accomplice which incriminates the accused is "of quite recent vintage." *Lilly v. Virginia*, 527 U.S. ___, ___, 144 L. Ed. 2d 117, 130-31, 119 S.Ct. 1887, 1897 (1999).

In *Lilly*, the defendant and two accomplices, including his brother, were arrested following a two-day crime spree during which they abducted a victim, who was later shot and killed. The defendant's brother admitted to police that he stole some alcoholic beverages, but he claimed that the defendant committed the murder. When the State called the brother to testify at the defendant's trial, he invoked his fifth amendment privilege against self-incrimination. The trial court then admitted the brother's extrajudicial statements as declarations of an unavailable witness against penal interest. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 125, 119 S.Ct. at 1892-93.

In affirming the defendant's convictions, the Virginia Supreme Court held that the confrontation clause was satisfied because the brother's statement fell within a

firmly rooted exception to the hearsay rule. Further, the Virginia court declared that the brother's statements were otherwise reliable because he knew that he was implicating himself as a participant in several crimes and because the evidence was independently corroborated by other evidence at trial. See *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 125, 119 S.Ct. at 1893.

However, the United States Supreme Court reversed, holding that an accomplice's confession that inculpates a criminal defendant is not within a firmly rooted exception to the hearsay rule as that rule has been defined by the confrontation clause. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 133, 119 S.Ct. at 1899. The Supreme Court also rejected the notion that the brother's statements were otherwise reliable, noting that the brother had a natural motive to exculpate himself and that his statements were made to the authorities while he was in custody, suspected of criminal misconduct, and under the influence of alcohol. The Court also remarked that the brother's statements were made in response to leading questions posed by the authorities. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 133, 119 S.Ct. at 1901.

The Supreme Court ruled that to be admissible under the confrontation clause, hearsay evidence used to convict a defendant must possess indicia of reliability by virtue of its inherent trustworthiness, not by reference to other evidence at trial. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 135, 119 S.Ct. at 1901. An accomplice's statements that shift or spread the blame to a criminal defendant fall outside the realm of hearsay exceptions that are so trustworthy that adversarial testing can be expected to

add little to the statements' reliability. *Lilly*, 527 U.S. at ___, 144 L. Ed. 2d at 132, 119 S.Ct. at 1898.

Notwithstanding these principles of law, the State argues that the circumstances surrounding Rhoden's statement and the nature of the statement itself supplied the necessary inherent trustworthiness. In support, the State maintains that: (a) Rhoden was not a suspect and was not in custody at the time he gave his statement; (b) he made a self-inculpatory statement; (c) he was not under the influence of alcohol or drugs; (d) the questions put to Rhoden by the police were open-ended and not leading; (e) Rhoden and the defendant belonged to the same gang, eliminating any motive to inculpate the defendant; and (f) only after admitting his own responsibility for the murder, 70 minutes after the questioning began, did Rhoden implicate the defendant. We disagree with the State's contention that these factors are sufficient to distinguish the instant case from *Lilly* and establish the inherent trustworthiness of Rhoden's statement.

Although Rhoden may not have been a suspect or in custody when he was first interrogated at the police station, by the time he inculpated the defendant he would have reasonably believed himself to be a suspect in the shooting. While Rhoden admitted to police his own role as an accessory to the crime, he identified the defendant as the shooter. Furthermore, any motivation Rhoden may have had to protect the defendant due to gang affiliation logically provides no more compelling evidence of reliability than the motivation of the brother in *Lilly* to protect that defendant.

The following questions from the police and answers given by Rhoden were read to the jury:

"Q. Okay, when did Nashaun start shooting at Paul's house?

A. When he arrived on the sidewalk.

Q. Okay, did he walk from the west side of Paul's house on the sidewalk, going towards the east, shooting at the house?

A. Yes.

Q. About how many times did he shoot, if you remember?

A. About five or six.

Q. While he was shooting at the house, was he walking along the sidewalk?

A. Yes.

Q. All right, who had the gun?

A. Nashaun Quick.

Q. What caliber gun was it?

A. Nine millimeter.

Q. What color was the gun?

A. Black."

The confession of an accomplice inculpating the accused is presumptively unreliable. *Lee v. Illinois*, 476 U.S. 530, 90 L. Ed. 2d 514, 106 S.Ct. 2056 (1986). Following our careful review, we simply cannot find that Rhoden's hearsay statement possessed sufficient indicia of reliability by virtue of its inherent trustworthiness to justify its admission without the defendant's opportunity for cross-examination.

Because Rhoden's statement was neither admitted pursuant to a firmly rooted hearsay exception nor shown to

contain particularized guarantees of trustworthiness, the court erred in admitting it.

Alternatively, the State argues that even if the admission of Rhoden's statement is considered error, it was harmless error beyond a reasonable doubt. Confrontation clause errors do not automatically warrant reversal, and a defendant's conviction can be affirmed if the court is able to conclude the error was harmless beyond a reasonable doubt. *People v. Johnson*, 116 Ill. 2d 13, 28, 506 N.E.2d 563, 570 (1987).

The State argues that Rhoden's redacted statement was admitted to show only: (1) that a nine-millimeter handgun was used, and (2) that the defendant was walking on the sidewalk near the house as the shooting occurred. The State points out that the type of gun used and the location of the shooter were otherwise established by the physical evidence. Hence, the State contends that Rhoden's statement added little to the case against the defendant.

An examination of the record belies the State's contention. In his statement, Rhoden identified the defendant as the shooter. That 9-millimeter shell casings were found near the sidewalk in front of the house and a 9-millimeter slug was recovered from the victim's body do not prove that it was the defendant who fired the shots. The weapon was not recovered, and aside from Rhoden's statement, there was no other evidence linking the defendant to such a weapon or to the location from which the shots were apparently fired. Further, although Jamison also implicated the defendant as the shooter in his statement to the police, he provided less detail and recanted his statement at trial. Aside from Jamison's

statement, the admissible evidence against the defendant was largely circumstantial. Therefore, we will not consider the admission of Rhoden's statement as harmless error beyond a reasonable doubt.

For the reasons stated, we reverse the defendant's conviction and remand this cause for a new trial.

II. Sufficiency of the Evidence

The defendant further contends that his conviction should be reversed outright, because the State failed to prove him guilty of first degree murder beyond a reasonable doubt. The standard of review for such contention is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found that the State proved the essential elements of the crime beyond a reasonable doubt. *People v. Collins*, 106 Ill. 2d 237, 261, 478 N.E.2d 267, 277 (1985).

The defendant argues that the verdict is not supported by the evidence because the State presented no unbiased third-party witness, the defendant did not confess, and there was no physical evidence linking the defendant to the crime. Our review of the evidence, however, in the light most favorable to the State, leads us to conclude that it was sufficient to prove the defendant's guilt beyond a reasonable doubt. Therefore, double jeopardy principles do not bar the State from proceeding against the defendant in a new trial.

Because we remand this cause for a new trial, we find it unnecessary to address the defendant's remaining assignments of error.

CONCLUSION

For the foregoing reasons, the judgment of the circuit court of Rock Island County is reversed and this cause is remanded for a new trial.

Reversed and remanded.

HOLDRIDGE, P.J., and SLATER, J., concur.

APPENDIX C

ILLINOIS SUPREME COURT
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April 5, 2000

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No. 88814 – People State of Illinois, petitioner, v. Nashaun B. Quick, respondent. Leave to appeal, Appellate Court, Third District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 2000.